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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S
RULING NO. MC2001-1/3

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Experimental Presorted
Priority Mail Rate Categories

Docket No. MC2001-1

PRESIDING OFFICER'S RULING ON THE USE OF RULE 67 PROCEDURES,
MOTION FOR WAIVER OF CERTAIN FILING REQUIREMENTS,
AND PROCEDURAL SCHEDULE

(Issued April 20, 2001)

Introduction and summary. This ruling addresses several matters related to further consideration of Docket No. MC2001-1. These include whether the proceeding should be considered under Rule 67, that provides expedited treatment for certain experimental classification change requests; the Postal Service's motion for waiver of certain filing requirements; and issuance of a procedural schedule. See Request of the United States Postal Service for a Recommended Decision on Experimental Presorted Priority Mail Rate Categories, March 7, 2001, at 1, (Request) and Motion of the United States Postal Service for Waiver of Certain Provisions of Rules 54 and 64, March 7, 2001, (Waiver Motion).

This proceeding will be conducted under Commission Rules 67-67d, and the Service's Waiver Motion is granted. A procedural schedule consistent with due process concerns about the ability to scrutinize the proposal in the shorter-than-standard period allowed under the experimental rules is issued.

Part I. Experimental Status/Rule 67-67d Treatment

A threshold question is the appropriateness of handling this case as an experiment eligible for expedited treatment under Commission Rules 67-67d. Under Rule 67(b), the Commission may require that the normal procedures applicable to nonexperimental classification requests be used to consider a request for an experimental classification. In making this judgment, the Commission is to apply criteria in rule 67(b) that require consideration of the novelty of the proposed change; its magnitude in terms of effect on costs, revenues, users, and competitors; the ease or difficulty of data collection; and the desired duration of the experiment. 39 C.F.R. § 3001.67(b)(1)-(4).

In addition to the Postal Service, participants affirmatively addressing application of the Rule 67(b) criteria include R.R. Donnelley and Sons (Donnelley) and United Parcel Service (UPS).¹ The Service and Donnelley support application of the rules for experimental cases; UPS opposes it. See Motion of United Parcel Service to Deny Experimental Treatment for Proposed Presort Rates, April 3, 2001, (UPS Motion); Opposition of the United States Postal Service to Motion of United Parcel Service to Deny Experimental Treatment for Proposed Presort Rate Categories, April 10, 2001, (Postal Service Opposition); and Donnelley Opposition to UPS Motion to Deny Experimental Treatment, April 10, 2001, (Donnelley Opposition).

The Postal Service's initial statements regarding experimental status. In support of experimental treatment, the Service's filing invokes the purpose of the experimental rules, a lack of historical supporting data, and distinctions between the discount requested here and one that was approved in Docket No. R90-1, but discontinued

¹ The OCA has not taken a position on this issue. It contends that the Service's lack of explicit treatment of certain filing rules on data collection makes it impossible to judge what data can be provided without an experiment and whether the proposed experiment will actually produce the allegedly missing data. Office of the Consumer Advocate Response to Order No. 1306, April 3, 2001, at 2-3.

following Docket No. R97-1. The Service emphasizes that the experimental rules, among other things, are designed to facilitate the Service's compliance with a statutory duty, under 39 U.S.C. § 403(a), to "plan, develop, promote, and provide adequate and efficient postal services." Postal Service Request at 2. In particular, the Service cites its need to expeditiously change classifications and rates through the experimental process to test operational feasibility, customer response, or other appropriate goals. *Ibid.*

With respect to supporting data, the Service asserts that the experimental rules contemplate review of proposed experiments in the absence of the historical cost, volume, revenue and other data "that normally would underlie a request for a permanent change in mail classifications." *Ibid.* Regarding the earlier discount, the Service acknowledges that it has "had some experience with a Priority Mail presort discount," but notes that this discount has not been in effect for over two years, and was structurally different from the discounts now being proposed. *Id.* (fn. 1). Moreover, the Service contends that use of the more flexible and expedited procedures afforded by the experimental rules is appropriate because of the "intense competition in the market for expedited delivery service" and because "the detailed, conventional data necessary to support a request for a permanent classification change" are unavailable. *Id.* at 5.

A. The UPS Motion to Deny Experimental Status and Treatment

UPS's opposition to experimental status. UPS generally contends that use of the experimental rules should not be approved here because the proposed worksharing discounts are not new or innovative; the experimental period is longer than necessary; and the shorter procedural timetable allows less scrutiny of the requested discounts than appropriate. UPS Motion at 2. In particular, UPS argues that the Commission has

consistently emphasized the new, untried or innovative aspects of requests involving experimental classifications. It contends the instant proposal “is not about innovation,” but is an effort to shortcut the normal procedures for evaluating the proposed discounts, thereby giving relief from recent Docket No. R2000-1 rates to certain large mailers. *Id.* at 3.

UPS also criticizes the Service’s suggestion that using the experimental rules is appropriate due to intense competition in the market for expedited delivery service and its interest in retaining Priority Mail volumes in the face of increasing competition. *Ibid.*, citing Request at 5.

UPS contends that the long history of presort discounts negates the need to conduct long-term experiments.² Moreover, it claims that the Service “actually offered a substantially similar discount during most of the 1990s.” *Id.* at 6, citing Docket No. R90-1. UPS characterizes the Service’s acknowledgement that it has had “some experience” with Priority Mail discounts not only as classic understatement, but an attempt to minimize the significance of its previous extensive experience with a Priority Mail presort discount. *Id.* at 7-8. UPS claims the Commission cannot ignore the fact that while the discounted rate structure is different, the “fundamental aspects” of both discounts are the same. Thus, it says that cost savings calculations based on the Service’s prior experience with the earlier discount should be available and helpful here. *Id.* at 8.

With respect to magnitude, UPS contends it is hard to evaluate the accuracy of the Service’s assertion that the proposed experiment offers “no appreciable risk of significant, negative financial results or harm to either the Postal Service, mailers using the service, or other mailers.” *Ibid.*, citing Request at 4. UPS’s support for this is its contention that the Service’s argument relies on witness Scherer’s testimony, although

² UPS’s Motion makes clear it regards three years as “long term.”

that testimony shows that no reasonable efforts to predict the possible magnitude of changes have been made. *Id.* at 8. Instead, UPS says the Service's predictions are based solely on experience with the earlier discount and, as it was abandoned in part because of its structure, mailer response based on that discount structure are "suspect at best." *Id.* at 8-9.

UPS also refers to a concern that postal officials have expressed about declining revenue per piece, and suggests that one possible contributing factor is "a proliferation of worksharing discounts based on overly optimistic cost avoidance estimates and overly high passthroughs." *Id.* at 9. Thus, UPS says that new discounts should not be implemented without careful and full review of their cost bases. *Ibid.* UPS also says the Service has not made a sufficiently strong showing that the magnitude of the proposed changes will be small enough to support evaluation "under abbreviated procedures and an abbreviated schedule." *Id.* at 10. UPS takes issue with the Service's contention that it cannot generate supporting data for a permanent change, and discounts references to complications from the termination of the Emery contract. *Id.* at 10.

With respect to the proposed three-year duration of the experiment, UPS notes that this is as long as—or longer than—permanent rates are usually in effect. *Id.* at 11. UPS contends that "good reasons" against three-year experiments include a greater risk of drain on revenues; the possibility that relevant costs will change over that period; and a two-rate cycle span. UPS also says that the imminence of another omnibus rate case creates a practical difficulty, as handling both proceedings at the same time would strain resources and likely compromise the ability of all involved to participate in both cases. *Id.* at 12.

B. Response to UPS's motion.

Postal Service. In response to UPS's motion to deny experimental treatment, the Service notes the basic fact that no Priority Mail classifications or rate distinctions based on mailer presentation now exist. Postal Service Opposition at 2. It acknowledges the earlier presort discount, but explains that mail processing and operational circumstances are now different than those at the time the earlier discount was terminated. Thus, it now seeks to determine, through an experiment, if "a different, more flexible approach" to Priority Mail presortation can bear fruit. *Id.* at 3. The Service also takes issue with the UPS's characterization of the Service's motives, and expressly denies that this experiment is an attempt to provide large mailers with rate relief.

Novelty. In further response to the contention that the proposal is not new or innovative, the Postal Service asserts that there is no basis on the face of rule 67, in the underlying rulemaking, or in the Commission's subsequent interpretations, to infer that an experimental proposal "must be so novel that it can bear absolutely no resemblance to any previous practice or classification." *Id.* at 9. The Service also cites the Commission's statement, in a docket where barcoding was involved, that while novelty and duration are "considerations," the rule does not establish a uniform standard for the degree of novelty or length of time that is appropriate for an experiment. *Ibid.*, citing PRC Op. MC96-1 at 18.

The Service criticizes what it regards as UPS's view that any "novelty" to the current proposal is precluded by the earlier discount. It says this implies that upon termination of that classification and rate, "the Postal Service forever lost all right under any circumstances to seek application of the Commission's experimental rules to test the efficacy of any form of Priority Mail presortation." *Id.* at 10. Instead, the Service says its earlier experience "only serves to enhance" the appropriateness of its request in this proceeding. In particular, it says: "The currently ongoing changes in Priority Mail

processing identified by witness Levine (USPS-T-2, at 2) reinforce the value of employing the experimental procedures to permit a measured and deliberate examination of the viability of the current proposal in a controlled setting.” *Ibid.*

Magnitude. With respect to magnitude, the Service says the proposals’ effects are modest and have been reasonably estimated. It notes that UPS claims that the magnitude of the changes cannot be determined from witness Scherer’s testimony, but counters that UPS fails to demonstrate that the data that have been filed are insufficient or inappropriate for analyzing the efficacy of the proposal. *Id.* at 11. The Service then notes that the referenced testimony provides various estimates, and claims that these are “more than sufficient” to meet rule 67, given the limits on what can be known from available data. *Ibid.*

The Service also contends that other UPS observations, such as those regarding advance market research and statements regarding declining revenue per piece, do not undermine the basis for proceeding under the experimental rules. *Id.* at 12. Finally, it says that UPS fails to articulate how proceedings under rule 67 will deny it an opportunity for a “careful and full” review of this experimental proposal. *Ibid.*

Data collection. The Service also takes issue with UPS’s contention that the data to support a proposal for permanent Priority Mail discounts is not difficult to obtain, as other discounts have been based on market surveys or on data from established systems. The Service says the fact that it has considerable experience in estimating presort cost savings and mailer response in the absence of experimental rate changes “does not persuasively militate against the experimental approach here.” *Id.* at 13. The Service also notes that UPS focuses mainly on the lack of market response to the earlier discount as the reason for its abolition, but ignores another compelling reason—namely, the impending implementation of the PMPC processing and distribution network. The Service asserts that this development would have diminished the value of Priority Mail worksharing. Moreover, the Service says this consideration—the operating

change—highlights the difference between the circumstances surrounding elimination of the original Priority Mail presort classification and the current operational changes “which would appear to restore a favorable environment for capturing presort savings.” *Id.* at 13-14.

The Service also states that using cost data from the earlier discount, as UPS suggests, would have little value. It notes that the earlier data were not sufficiently disaggregated to provide reliable estimates for the separate worksharing levels then in effect. It also says the ongoing network conversion can be expected to have an impact on future Priority Mail processing costs “that makes reliance on what was known several omnibus rate proceedings ago ill-suited for use as a basis for modeling costs of the rate categories proposed in the experiment.” *Id.* at 14.

Duration. Regarding UPS’s criticism of the proposed three-year duration of the experiment, the Service notes that UPS has said that the longer the experiment, the greater the risk of potential drain on revenues. However, the Service says that UPS fails to mention the potential cost savings which can be expected to offset any revenue loss, nor does UPS consider the degree to which conservative passthroughs guard against the risk of revenue leakage. *Id.* at 17.

The Service also says that the relationship between the timing of an experiment and omnibus rate cases is a matter which, if it has any relevance, can be addressed during the course of the experiment. In particular, it says the impossibility of knowing whether the proposed experimental rates will outlast the rates emerging from the next omnibus rate proceeding is “no reason to forgo examination of the experimental request presently before the Commission.” *Ibid.*

Donnelley opposition. Donnelley, in response to UPS’s Motion, prefaces its remarks with the statement that it made little or no use of the Priority Mail presort discounts approved as a result of Docket No. R90-1, but believes it would make fairly extensive use of the proposed Priority Mail presort rates because of the “added

flexibility” in the proposed discount structure. Donnelley Opposition at 1-2. Donnelley takes issue with UPS’s contention that the experiment would give “rate relief [only] to certain large mailers.” *Id.* at 1, citing UPS Motion at 3. In particular, it says that if it participates in the experiment, the mail it presents would be “on behalf of both large and not so large mailers.” *Ibid.* Moreover, it says that participation in the experiment by entities such as Donnelley would guarantee that the benefits of the experimental rates will serve not just a handful of very large entities but a meaningful cross-section of the community of Priority Mail users. *Id.* at 1-2

C. Discussion

The special rules available for experimental classification changes include frequently desirable features such as expedition of the procedural schedule and more flexible data submissions. The Commission’s rules make clear that use of these rules is not simply a matter of preference, but a choice to be made after consideration of four standards in rule 67(b). These standards (novelty, magnitude of the change, data collection issues, and duration) allow the Commission to consider relevant factors and strike a balance between the Service’s legitimate interests in expeditiously pursuing field tests of potential offerings, and users’ and competitors’ legitimate concerns about the potential impact of the experiment.

With respect to novelty, the fact that there has been a previous (and recently discontinued) Priority Mail presort discount understandably gives rise to the question of whether the instant proposal therefore fails to meet the first element of the rule 67’s four-part test. UPS, in support of its position that the proposal is not unique or innovative, cites a dictionary definition of the term “novel,” and further claims there are few substantive differences between the current and previous discounts. The Postal Service, on the other hand, considers the novelty criterion satisfied, given contextual

factors that go far beyond the absence of the “sequential” qualifying requirements in the earlier discount. These include significant operational changes and the passage of time since introduction and abolition of the previous discount.

The proposal’s novelty is both a closer question than the Service suggests, and less rigid than UPS contends. As the Service’s position suggests, simply altering a presort structure is probably not enough to be considered novel. Given the nature and evolving state of postal operations, adoption of the strict dictionary definition UPS urges as a litmus test could establish a near-insurmountable hurdle in devising experiments. Instead, as in past cases, novelty must be considered in the broad context of postal classification.

Under this approach, it can be found, on balance, that the proposal presents a sufficiently new take on worksharing in Priority Mail to satisfy the intent underlying inclusion of the “novelty” criterion in the experimental rules. Factors that tip the balance in this direction are significant changes in the Priority Mail operating network since the termination of the earlier discount; the fact that these changes were not undertaken solely to advance this proposal; and the fact that the nature of the changes appears to warrant an investigation of whether new worksharing opportunities, which offer mailers a somewhat different means of qualifying for discounts, are now feasible.

Magnitude of the effects of change. The Postal Service is persuasive in its response to UPS’s arguments that no reasonable efforts have been made to predict the possible magnitude of the effects of the proposed changes. While having more data is generally preferable, the Service correctly notes that there are limits on what can be known from available data. Postal Service Opposition at 10. Moreover, the Service points out advance market research might not necessarily provide the information that is being sought in the experiment. UPS does not offer argument detailing the potential impact of the experiment on competitors, and the Service also correctly points out that

UPS has not articulated how proceedings under Rule 67 will deny it an opportunity for a “careful and full” review of this proposal. *Id.* at 12.

Data collection. On the question of data collection, UPS poses legitimate questions about whether the existence of data associated with the earlier discount precludes the need for conducting the experiment, and whether the Service could pursue its interests in mailers’ response to the discounts through a combination of advance market research and the recent cost data produced by existing data systems, independent of this experiment. However, the Service provides persuasive reasons why UPS’s suggestions, which might be found to be plausible under other circumstances, are not appropriate here. These include, among other things, the lack of sufficient disaggregation in the earlier data to provide reliable estimates for the then-effective worksharing levels. It also includes the belief that expected changes to the operating network will have an impact on future Priority Mail processing costs that renders reliance on any earlier data and information ill-suited for modeling costs of the proposed rate categories” *Id.* at 14.

Duration. Rule 67(b) prescribes no set minimum or maximum for experiments, leaving these decisions to depend on the circumstances of each case. Here, it appears that there are also several reasons why UPS’s concerns—about revenue loss, possible overlap with the next omnibus rate case, and the potential that experimental rates would be in effect longer than some permanent rates—are either unfounded or outweighed by other considerations.

The Service notes, for example, that the risk of revenue loss is moderated by the presumed cost savings associated with worksharing, and by the conservative nature of the proposed passthroughs. It also says that practical concerns—such as experimental rates that span two different rate cycles or the possibility of having to devote resources to both the experiment and an omnibus rate case—can be capably dealt with if these developments actually ensue.

Moreover, although the pragmatic concerns UPS raises are valid factors to consider in assessing the appropriateness of the three-year period the Service has requested, the experiment's objectives—and the nature and extent of the steps needed to achieve those objectives—must necessarily be the primary consideration, and remain the primary focus of this evaluation. Against this standard, the need to identify and gain the participation of participants in the experiment, establish internal procedures, and assess results prior to submitting a request for a permanent classification suggests that three years is a reasonable period to conduct the experiment.

On balance, it appears the Service's request satisfies rule 67(b)(4) considerations. Interested persons will still have ample opportunity to develop and present evidence on issues relevant to whether the proposed discount is or is not consistent with the policies of the Act.

Part II. Motion for Waiver of Certain Filing Requirements

The Service's Request was accompanied by a contemporaneous motion for waiver of certain filing requirements in rules 54 and 64. Commission Order No. 1306 (issued March 14, 2001) directed participants to respond to this motion by April 5, 2001. The OCA was the only participant to file a formal response. See Office of the Consumer Advocate Response to Order No. 1306, April 3, 2001, (OCA Response).

Rule 64(h) provides that when requesting a change in the classification schedule, the Service must provide certain rule 54 information if the proposal results in a change in the rates or fees for any existing class or subclass; the establishment of a new class or subclass for which rates are to be established; a change in the relationship of costs to revenues for any class or subclass; or a change in the relationship of total Postal Service costs to total revenues.

The Service's position is that the proposed changes in the classification schedule do not significantly change any or all of the referenced rates or cost-revenue relationships. It therefore contends, among other things, that some subsections (identified in its Motion) do not apply to this proposal. Motion for Waiver at 1.

The OCA states that to the extent the Service has explicitly identified rules that it desires waived, it has no objection; however, it asserts that the Service's motion is incomplete, as it does not request waiver of rules 64(a), 67b, or 67c(a). OCA Response at 1. In effect, the OCA says these rules, considered as a whole, require more description of what would be necessary to develop this information, and the Service's data collection plans, than the Service has provided. In particular, it characterizes witness Levine's testimony as vague and cursory on this point. *Id.* at 2.

Discussion. To the extent the Service's motion is not in issue, waiver is granted, as requested. With respect to matters the OCA has raised in connection with data collection plans, it appears that the initial filing provides relatively little detail. However, OCA has not requested specific relief, but instead has pursued its interests through discovery. At this time, discovery responses have expanded on the Service's plans for gathering and evaluating data, and have explained why some information was not filed. See Response of Postal Service Witness Levine to OCA/USPS-T-2-3 and -4. If the OCA believes that the discovery process ultimately fails to provide an adequate basis for issuance of a Commission decision on the substantive merits of the experiment, it may seek further relief.

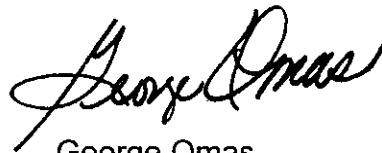
Part III. Development of a Procedural Schedule

Given the conclusions reached above, it is appropriate to develop a procedural schedule that accommodates not only the Service's interest in expedition, but also UPS's concerns that there be an adequate opportunity to scrutinize the proposal. The

attached schedule reflects these considerations. In particular, it provides an adequate opportunity for both discovery and oral cross-examination of witnesses. In issuing this schedule, it is noted that discovery against the Postal Service's witnesses has been authorized since issuance of Order No. 1306 on March 14, 2001.

RULING

1. The Postal Service's Request in Docket No. MC2001-1 will be considered under Rules 67-67d.
2. The Postal Service's Motion for Waiver of certain filing requirements, referenced in the body of this ruling, is granted.
3. The procedural schedule in the attachment is adopted.

A handwritten signature in black ink, appearing to read "George Omas", written in a cursive style.

George Omas
Presiding Officer

PROCEDURAL SCHEDULE
(all dates in 2001)

March 7	Request Filed
April 3	Deadline for Filing Notices of Intervention
April 6	Prehearing Conference
May 1	Discovery on Postal Service Witnesses Ends
May 16-17	Hearings (Cross-examination of Postal Service Witnesses)
May 18	Participant Statements Identifying Issues of Material Fact [See, Rule 67a(b)]
May 24	Responses to Statements Identifying Issues of Material Fact [See, Rule 67a(b)]
June 4	Filing of Participants' Testimony/Rebuttal to Postal Service
June 25	Discovery on Participants' Witnesses Ends
July 11-12	Hearings (Cross-examination of Participants' Witnesses)
July 19	Filing of Rebuttal to Participants' Testimony
July 26	Hearings on Rebuttal Testimony
August 6	Filing of Initial Briefs
August 13	Filing of Reply Briefs